"My ticket was brought by one of Dr. Mahmood's children by mistake. Dr. Mahmood's children got seats in the plane. In Kuala Lumpur M.A.S. made out a new return ticket for me.... I have got my ticket back at London Airport."

The Warsaw Convention as amended at The Hague, 1955 has been made applicable to Malaysia as from December 19, 1974 by the Carriage by Air Act 1974 of Malaysia. The plaintiff purported to rely on Article 19 of the Convention which is in the following terms:

"The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo."

In my judgment Article 19 applies in a case where under the contract of carriage the time for the carriage is fixed. I have already shown that in the present case time for the carriage was not fixed in view of Condition No. 9 printed on the ticket, which provides, *inter alia*, "Times shown in timetables or elsewhere are not guaranteed and form no part of this contract." Article 19 should be read subject to Article 3(2) which provides –

"The passenger ticket shall constitute *prima facie* evidence of the conclusion and *conditions* of the contract of carriage."

I emphasize the word "conditions" in order to lay stress on the point that the carriage is subject to the conditions stated in the ticket. In the present case one of those conditions was Condition No. 9.

The appeal is allowed and the President's judgment is set aside. The plaintiff's claims are dismissed. Costs to the appellant (the defendant) here and in the court below.

Appeal allowed.

Solicitors: *Tahir & Salleh; Joginder Singh & Co.*

W.E. BALASINGAM v. THE BAR COUNCIL

[A.C.J. (Wan Hamzah S.C.J., Harun & Zakaria Yatim JJ.) April 12, 1985]

[Kuala Lumpur – Originating Motion No. A33 of 1984]

Legal Profession – Advocate and solicitor – Conviction under ss. 109 & 409, Penal Code (F.M.S. Cap. 45) – Disciplinary Committee appointed – Appellant struck off the Roll – Appeal – Conduct of advocate and solicitor in his professional capacity – Appeal record not before Disciplinary Committee – Fresh inquiry – Penal Code (F.M.S. Cap. 45), ss. 109 & 409 – Legal Profession Act, 1976, ss. 93(2) (a), 100, 100(1) & 101(1) – Advocates and Solicitors (Disciplinary Enquiry) Procedure Rules 1970, r. 10.

Penal Code, ss. 109 & 409.

The appellant, a practising advocate and solicitor, was convicted in the Sessions Court under sections 109 and 409 of the Penal Code with abetting the commission of criminal breach of trust in respect of a sum of $29,500. He was sentenced to six months' imprisonment and a fine of $20,000. His appeal to the High Court was dismissed. Subsequently a Disciplinary Committee appointed by the Chief Justice to hold a formal inquiry under section 100 of the Legal Profession Act made an order that the appellant be struck off the roll of advocates and solicitors. He now appeals against that order on six grounds, among them that the Disciplinary Committee failed to fully appreciate the facts that the conviction of the appellant did not touch upon the conduct of the appellant as an advocate and solicitor and that the Committee was not in possession of the appeal record of the Sessions Court.

Held: (1) it was not open to the Disciplinary Committee to go behind the conviction to ascertain whether the conviction was justified. The conviction was final in that the appeal against the conviction was dismissed, and therefore it was a conviction within the contemplation of section 93(2);

(2) it is not every kind of misconduct of the advocate and solicitor which the Disciplinary Committee should be concerned with but only misconduct committed in his professional capacity. The provisions of section 100(1), added by Act A567, came into force since December 16, 1983 and are inconsistent with the provisions of section 93(2) (a), which should be read subject to section 100(1), so that the words "a criminal offence as makes him unfit to be a member of his profession" appearing in section 93(2) (a) should be read and understood to mean a criminal offence committed in his professional capacity;

(3) for the reason that the Disciplinary Committee made the enquiry without the appeal record before it, its decision and order should be set aside and this case should be sent back to the Committee to hold a fresh inquiry. The Sessions Court appeal record and the High Court judgment should be made available to the Committee for the purpose of the fresh inquiry;

(4) it was not proper and correct for the Committee to arrive at a finding of instigation, conspiracy and aiding without the proper record of evidence before it.

ORIGINATING MOTION.

C. Navarednam for the appellant.
Ong See Seng for the respondent.

Cur. Adv. Vult.

Wan Hamzah S.C.J. (delivering the Judgment of the Court): Williams Ernest Balasingam, a practising advocate and solicitor, was convicted in the Ipoh Sessions Court under sections 109 and 409 of the Penal Code with abetting the commission of an

offence of criminal breach of trust by one Mahendran s/o Arasanandam in respect of a sum of $29,500, and was sentenced to six months' imprisonment and a fine of $20,000. He appealed to the High Court and his appeal was dismissed.

After an initial inquiry was held under the Legal Profession Act a Disciplinary Committee was appointed by the Chief Justice to hold a formal inquiry under section 100 of the Act into the information touching upon the conduct of Mr. Balasingam. In his statutory declaration verifying the truth of the allegations in the Statement of Complaint the Secretary of the Bar Council stated that the documents which the Bar Council may rely on at the inquiry before the Disciplinary Committee were the appeal record of the Sessions Court case. After holding the formal inquiry the Disciplinary Committee made an order that Mr. Balasingam be struck off the roll of advocates and solicitors. He is now appealing against that order.

There are six grounds stated in Mr. Balasingam's Notice of Originating Motion. We shall deal first with ground No. 6 which reads:

"The Appellant was unaware that at the hearing before the Disciplinary Committee he was entitled to be represented by Counsel, as, in his interpretation of section 100(2) (a) of the Legal Profession Act 1976, it is only the Bar Council and the complainant who are permitted representations by Counsel."

As an advocate and solicitor Mr. Balasingam ought to have known his right of representation by Counsel. Rule 10 of the Advocates and Solicitors (Disciplinary Enquiry) Procedure Rules 1970 clearly provides that either side shall have the right to be represented by a counsel of his choice. It is not that he was denied of his right. Moreover, Mr. Navarednam acting as counsel for Mr. Balasingam at the hearing of this appeal argued the case fully, as good as if he was arguing before the Disciplinary Committee. Therefore in our judgment this ground should be dismissed.

Next, we shall deal with ground of appeal No. 1, which reads:

"The Disciplinary Committee misdirected itself on its functions by acting on the assumption that, because the Appellant had been convicted of a criminal offence, he came within the ambit of the provisions of Section 93(2)(a) of the Legal Profession Act, 1976."

The following are the provisions of the Act referred to:

"Due cause may be shown by proof that the advocate and solicitor in Malaysia or elsewhere –

(a) has been convicted of a criminal offence as makes him unfit to be a member of his profession."

In our judgment it was not open to the Disciplinary Committee to go behind the conviction to ascertain whether the conviction was justified. The conviction was final in that the appeal against the conviction was dismissed, and therefore it was a conviction within the contemplation of section 93(2).

We shall consider grounds Nos. 3 and 4 together. They are stated as follows:

"3. The Disciplinary Committee failed to fully appreciate the fact that the conviction of the Appellant did not touch upon the conduct of the Appellant as an advocate and solicitor.

4. The Disciplinary Committee failed to consider or to consider adequately the fact that the Appellant had not committed any offence involving misuse of the moneys of his clients or of any of them, or of dishonesty towards a client, or in respect of any property belonging to a client."

Section 100(1) of the Legal Profession Act provides as follows:

'It shall be the function of the Disciplinary Committee to conduct a formal inquiry into the complaint or information touching upon *the conduct of an advocate and solicitor in his professional capacity* with respect to which the Committee has been appointed."

We emphasise the words "the conduct of an advocate and solicitor in his professional capacity" in order to emphasise the point that it is not every kind of misconduct of the advocate and solicitor which the Disciplinary Committee should be concerned with but only misconduct committed in his professional capacity. The present provisions of section 100(1) have been added by Act A567 and have come into force since December. In our opinion they are inconsistent with the provisions of section 93(2)(a) in that under section 93(2)(a) due cause may be shown by proof that an advocate and solicitor has been convicted of any criminal offence as makes him unfit to be a member of his profession, whereas under section 100(1) the function of the Disciplinary Committee to conduct a formal inquiry is confined to an inquiry into the conduct of an advocate and solicitor in his professional capacity only and does not extend to an inquiry into a conviction of an offence which was committed otherwise than in professional capacity.

Since the present provisions of section 100(1) have been introduced by way of amendment to the Act, in our opinion, section 93(2)(a) should be read subject to section 100(1), so that the words "a criminal offence as makes him unfit to be a member of his profession" appearing in section 93(2)(a) should be read and understood to mean a criminal offence committed in his professional capacity.

In the present case the Disciplinary Committee in its Order did not make a specific finding whether Mr. Balasingam had committed the abetment of criminal breach of trust in his professional capacity. It appears that at the time of the inquiry by the Committee the appeal record of the Sessions Court was not placed before the Committee and therefore the Committee did not have the opportunity and facility to consider the full facts of the case to enable it to ascertain whether the offence was committed by Mr. Balasingam in his professional capacity. In its Order the Committee stated the following finding of fact: "The Respondent had at no time used clients' monies in advancing the sum of $23,000 to Mahendran s/o Arasarandam nor has the clients' account of the Respondent's firm at any time been short of funds as certain clients' monies were placed in fixed deposit, which is permitted by the Solicitors Accounts Rules." It may be argued that this finding is tantamount to a finding that the offence was not committed by Mr. Balasingam in his professional capacity, and we understand that it was contended so by his Counsel. But this stated fact may not be the only fact to be considered to ascertain whether the offence was committed by Mr. Balasingam in his professional capacity. There may be some other facts which have to be taken into consideration. The appeal record which consists of the notes of evidence and the judgment of the President of the Sessions Court should be read in order to get the facts of the case. The judgment of the High Court in the criminal appeal should also be read. Since the appeal record was not before the Committee, it was of course not produced to the High Court in the present appeal. It is not clear from where the Committee obtained the fact which they stated as above. For the reason that the Committee made the enquiry without the appeal record before it, in our judgment its decision and order should be set aside and this case should be sent back to the Committee to hold a fresh inquiry and the Sessions Court appeal record and the High Court judgment should be made available to the Committee for the purpose of the fresh inquiry. We order accordingly.

For the purpose of completeness we would like to consider also the remaining grounds of appeal, *i.e.*, grounds Nos. 2 and 5, which are in the following terms:

"2. The Disciplinary Committee had no grounds for arriving at the simple conclusion that the Appellant instigated, conspired with and aided one Mahendran son of Arasanandam to commit criminal breach of trust because the Disciplinary Committee was apparently not in possession of the records of the case in which the Appellant was convicted.

5. The Disciplinary Committee, in handing down its decision, failed to consider the mitigating circumstances pertaining to the Appellant."

We believe that ground No. 2 is relevant to the question of mitigation and therefore we would like to consider it together with ground No. 5. On the question of mitigation, in our opinion it is relevant to refer to the following provisions of section 101(1):

"A Disciplinary Committee may make such order as it thinks fair and reasonable, including –

(a) striking off the Roll the name of the advocate and solicitor against whom the complaint was made or information referred;

(b) suspending from practice the advocate and solicitor;

(c) imposing on the advocate and solicitor a penalty not exceeding five thousand ringgit payable to the Compensation Fund;

(d) censuring the advocate and solicitor;

(e) awarding costs to or against any party."

So the Disciplinary Committee has a very wide discretion to make any order as it thinks fair and reasonable. It has to ascertain whether there are mitigating circumstances which justify any one of the more lenient treatments. Abetting the commission of an offence consists of:

(a) instigating another person to commit the offence, or

(b) engaging with another person in a conspiracy for the commission of that offence, or

(c) intentionally aiding the commission of that offence.

In considering the question of mitigation, aiding should be taken as less serious than instigation and should attract a less severe sentence. In the present case the Disciplinary Committee made a finding that Mr. Balasingam was guilty not only of aiding but also of instigating and conspiring. This seems to be one of the reasons why the Committee

took a serious view and imposed the more severe punishment of striking off the roll. The question is whether it was proper and correct for the Committee to arrive at a finding of instigation, conspiracy and aiding without the proper record of evidence before it. In our opinion it was not.

Order accordingly.

Solicitors: *Sulaiman C. Navarednam; Mah-Kok & Din.*

POH AH CHOO v. TAN SIEW GIM & ORS.

[O.C.J. (Edgar Joseph Jr. J.) April 3 & 12, 1985]

[Penang – Suit No. 295 of 1984]

Probate and Administration – Letters of administration extracted in 1964 – Suit filed in 1984 – Ex parte injunction – Delay not explained – Application to discharge injunction – Fresh application on notice – Merits.

The plaintiff claims that as the lawful secondary wife of a deceased who died intestate on February 26, 1963, she is entitled to a share in his estate. The first defendant is the lawful wife of the deceased and the other five defendants are the lawful children of that marriage. The plaintiff obtained an *ex parte* interlocutory injunction against the defendants jointly or severally from dealing with certain property forming part of the estate of the deceased.

The first and second defendants extracted the letters of administration of the deceased's estate as long ago as 1964 and the suit was filed in 1984. The plaintiff, when applying for the *ex parte* order, made no attempt to explain what was apparently an inordinate delay. The defendants applied to discharge the *ex parte* order.

Held: (1) there was in this case a non-disclosure of material facts in that the plaintiff had omitted to explain at the *ex parte* stage, the lapse of nearly 20 years on her part in the institution of the suit. The *ex parte* order would therefore have to be set aside irrespective of the merits;

(2) the plaintiff, however, does not become anathema for all purposes. She may make fresh application, on notice, which will be considered on its merits;

(3) the application for discharge would be allowed with costs.

Cases referred to:

(1) *Thomas A. Edison Ltd.* v. *Bullock* (1912) 15 C.L.R. 679.
(2) *Sherwell* v. *Combined Incandescent Mentles Syndicate Ltd.* [1907] W.N. 211, 212.
(3) *A.G.* v. *Liverpool Corporation* (1835) 40 E.R. 342, 356.
(4) *Rex* v. *Kensington Income Tax Commissioners* [1917] 1 K.B. 486, 504.
(5) *Re a debtor (No. 75N of 1982, Warrington), ex parte the debtor* v. *National Westminster Bank plc & Anor.* [1983] 3 All E.R. 545, p. 551 d.
(6) *Castelli* v. *Cook* (1849) 7 Hare 89; 68 E.R. 36.
(7) *Dalglish* v. *Jarvie* (1850) 2 Mac. & G. 231; 42 E.R. 89.

CIVIL SUIT.

K. Balasundaram for the plaintiffs.
David Choong for the defendants.

Cur. Adv. Vult.

Edgar Joseph Jr. J. : This was a defendants' application for discharge of an *ex parte* interlocutory injunction ("the *Ex Parte* Order") granted by me and arising out of a suit by the plaintiff who claims that as the lawful Secondary Wife of one Ooi Guan Lee ("the deceased") who died intestate on February 26, 1963 she is entitled to a share in his Estate.

The first defendant is the lawful wife of the deceased. The second, third, fourth, fifth and sixth defendants are the lawful children of that marriage.

The *Ex Parte* Order restrained the defendants whether jointly or severally from in any manner selling, charging, leasing or otherwise howsoever dealing with certain lands and hereditaments specified therein and which form part of the Estate of the deceased.

Although Letters of Administration in respect of the Estate of the deceased were extracted as long ago as September 4, 1964 in favour of the first and second defendants, it was not until July 4, 1984 that the Suit herein was instituted so that, on the face of it, the claim therein was in the nature of a very stale demand; yet, when applying for the *Ex Parte* Order, no attempt was made by the plaintiff to explain what was apparently an inordinate delay.

Not unexpectedly, therefore, at the *inter partes* stage, counsel for the defendants, when moving for the discharge of the *Ex Parte* Order, stressed the want of promptitude on the part of the plaintiff in instituting the Suit and seeking the *Ex Parte* Order.

What, however, I considered was more to the point, was whether, at the time when she sought the *Ex Parte* Order, the plaintiff had brought forward all material facts which the defendants might